Supreme Court, U.S.
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No. 88-1910

In the

Supreme Court of the United States

OCTOBER TERM, 1988

DANIEL H. OVERMYER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO MEMORANDUM IN OPPOSITION

STANLEY NEUSTADTER
Attorney for Petitioner
342 Madison Avenue
Suite #1002
New York, New York 10017
(212) 348-6469

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In opposing petitioner's application for a writ of certiorari, the Government does not address the merits of the petition, nor does it dispute this Court's jurisdiction to adjudicate them, nor does it dispute fitness for review on the grounds of lack of preservation.

Rather, the Government advances the argument—ungraced by either statute, court rule or case law—that review by this Court of the court of appeals decision would be "premature at this time" [Gov't Mem. at p. 3]. In support of this *ipse dixit*, the Government hypothesizes a series of possible turns future litigation, not yet even in existence, might take, all of which is distinctly in the realm of the improbable.

True, the procedural posture of this case [review of a court of appeals judgment reversing a judgment of acquittal] is somewhat unusual, and that most federal criminal cases where certiorari is sought come to this Court only after all proceedings below have been completed. Nonetheless, the Government's memory is self-servingly short; currently pending on this Court's docket of undecided cases is *United States v. Monsanto,* No. 88-454 (argued March 21, 1989), a case where the Government itself sought certiorari from a court of appeals decision reversing an interlocutory order of a district court. The same kinds of unlikely turns of litigational events were hypothetically possible in that case as well, so it seems that "prematurity" is not so much a principle of review-worthiness as it is an expedient for the Government to trot out when convenient to its immediate purposes.

This petition presents a question of grave and direct implication to all bankruptcy litigants who, if the ruling below stands, might well be deterred from filing and pressing reasonably colorable claims for fear that, despite Congress' expansive and beckoning definition of "claim," they might end up convicted of filing a "false" claim. This is all the worse because the criminal statute itself was not intended to be applied to claims filed at a point in the proceedings where, as here, the parties contemplated full adversarial litigation. The upshot is that a losing *bankruptcy* court claimant runs a risk of criminal prosecution that a losing *district court* plaintiff litigating the same cause of action has no exposure to. Nothing either in the Bankruptcy Code or in Title 18, or in the legislative history of 18 U.S.C. §152 requires or anticipates such skewed treatment for the bankruptcy claimant.

Such are the direct and immediate implications of the ruling below, and they seem considerably more palpable than the Government's convenient and speculation-based theories of "prematurity."

CONCLUSION

For the foregoing reasons, and for those already stated in the petition, this Court is respectfully requested to grant this petition for certiorari.

Respectfully submitted,

STANLEY NEUSTADTER
Attorney for Petitioner
342 Madison Avenue
Suite #1002
New York, New York 10017
(212) 348-6469

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